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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 JESSECA NALDO,

4 Plaintiff,

New York, N.Y.

5 v.

15 Civ. 2896 (PKC)

6 GLAZE TERIYAKI, LLC, PAUL KRUG
7 and DENNIS LAKE,

8 Defendants.
-----x

9 April 12, 2016
10 9:20 a.m.

11 Before:

12 HON. P. KEVIN CASTEL,

13 District Judge

14 APPEARANCES

15 PARDALIS & NOHAVICKA, LLP
16 Attorneys for Plaintiff
17 BY: ARIADNE PANAGOPOULOU
18 JOSEPH D. NOHAVICKA

19 HELBRAUN LEVEY & O'DONOOGHUE LLP
20 Attorneys for Defendants
21 BY: KEVIN SEAN O'DONOOGHUE
22 ROBERT ONTELL

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1 (Jury not present)

2 THE COURT: Good morning. My clerk received an email
3 from counsel for the plaintiff last evening indicating that the
4 plaintiff had no proposed changes to either the verdict sheet
5 or the jury instructions as circulated yesterday, is that
6 correct?

7 MS. PANAGOPOULOU: Yes, your Honor.

8 THE COURT: Okay. And I received an email, or my
9 clerk received an email this morning from defendants' counsel
10 indicating that the defendant had no proposed changes to either
11 the special verdict sheet or to the jury instructions, is that
12 correct?

13 MR. ONTELL: That's correct, your Honor.

14 THE COURT: All right. Now let me raise an issue with
15 each of you. It appears to me that there is no spread of hours
16 claim based on the testimony, is that correct?

17 MS. PANAGOPOULOU: Yeah, we wouldn't mind having that
18 stricken now, yes.

19 THE COURT: And obviously, the defendants have no
20 objection to that.

21 MR. ONTELL: That's correct.

22 THE COURT: It also appeared to me in the jury
23 instructions that I was needlessly wordy with the jury on
24 statute of limitations. So on the statute of limitations with
25 regard to the FLSA claim, I need to instruct the jury as

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1 follows: If you find that the plaintiff has proved that the
2 defendants are liable for unpaid wages under the FLSA, the
3 special verdict sheet will ask you to decide whether the
4 defendants acted willfully.

5 And then it would go on: An employer acts willfully
6 if he knew or showed reckless disregard for the question of
7 whether its conduct was prohibited by the FLSA. An employer
8 acts with reckless disregard when it acts or fails to act with
9 a conscious lack of concern for the consequences.

10 That is all I think I need to say to the jury on the subject of statute of limitations, and I think introducing the words "statute" and "limitations" and telling them whether you recover for two years or three years is not anything they need to know. And correspondingly, there's nothing that needs to be said on the New York claim that the jury has to take into account. Does the plaintiff agree?

17 MS. PANAGOPOULOU: Yes, your Honor.

18 THE COURT: Does the defendant agree?

19 MR. ONTELL: We do.

20 THE COURT: That's fine. So that's going to come out.

21 Now a question I have, and this was a matter of great discussion, I want to make sure that all concerned are on the same page as to item C on page 3 of the special verdict. This is the special verdict sheet pursuant to Rule 49(a) of the Federal Rules of Civil Procedure. Is the plaintiff on board

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1 for these five questions?

2 MS. PANAGOPOULOU: Yes, your Honor.

3 THE COURT: All right. Is the defendant on board? Is
4 there an agreement that these are the five questions that the
5 Court should put to the jury?

6 MR. ONTELL: Yes.

7 THE COURT: All right. Let me hand out the revised
8 jury instructions and the revised special verdict sheet, and
9 I'm going to have them marked as the next two Court exhibits.

10 So the instructions are Court Exhibit 5 and the
11 verdict sheet is Court Exhibit 6. The instructions are marked
12 to show changes.

13 Now I guess a question I should put to you all is what
14 happens if the jury puts down a number in response to question
15 C1 and 2 but checks no on 3?

16 Let me hear from the plaintiff.

17 MS. PANAGOPOULOU: This is why we were concerned
18 initially about the question, and we asked you if it would be
19 okay instead of at least 30 hours to have an average 30 hours.

20 THE COURT: Well, I think there's a problem with the
21 word "average." What if they find she worked an average of 30
22 hours? You can't recover based on an average, can you?

23 MS. PANAGOPOULOU: But at the same time, you can't
24 recover for at least as well.

25 THE COURT: Here's the problem, I have asked maybe

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1 about seven times on this record whether the parties consent to
2 this language. I asked it in written form, I asked it orally,
3 I just am now asking the question what happens if the jury
4 checks "no."

5 MS. PANAGOPOULOU: And I think it's unfair that
6 defendant automatically wins just because they find that she
7 worked certain amount of hours but that it's not necessarily 30
8 or more.

9 THE COURT: Then why do you consent to this verdict
10 sheet?

11 MR. NOHAVICKA: Your Honor, may I be heard on this?

12 THE COURT: Sure.

13 MR. NOHAVICKA: We had a lot of discussions about this
14 particular issue also at our office, and I think it's fine like
15 this. I don't think we need "average." I think "average" puts
16 up a problem for all of us later on, so the 30 hours is fine
17 for us as it is.

18 THE COURT: All right. That's what I wanted to make
19 sure. It's fine for the defendants?

20 MR. O'DONOGHUE: Yes, your Honor, we went back and
21 forth, as I said, more than once. We wrote it, stepped out and
22 came back, and we all agreed to it. We like this language and
23 that's why we approved it.

24 THE COURT: And the plaintiffs agree to it?

25 MR. NOHAVICKA: Yes, your Honor, absolutely.

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1 THE COURT: All right. Fine. As soon as our jury
2 arrives, we'll be ready to go.

3 MR. O'DONOGHUE: Your Honor, while we're on the record
4 can I address one other issue?

5 THE COURT: Yes.

6 MR. O'DONOGHUE: As you know, at the close of
7 plaintiff's case yesterday we made our Rule 50 motion. As the
8 Court also knows, a Rule 50 motion, even if denied, remains
9 active until the end of the trial and can be reviewed.

10 This is not something that we want to rewrite, but in
11 review of the Court's jury instructions on page 19, there's a
12 threshold question regarding whether or not the company, Glaze
13 Teriyaki LLC, is in fact an employer under the meaning of the
14 FLSA because it made more than \$500,000. I know the Court and
15 plaintiff are familiar with this.

16 As the Court will recall, there was no testimony or
17 evidence introduced, produced or adduced from any of the
18 witnesses that indicated that the threshold was met. As a
19 result, the plaintiffs have failed to meet their burden on that
20 issue. Not on the labor law issue, I understand, the New York
21 labor law, but as to the FLSA, that claim no longer can
22 survive. There was never a stipulation made by us that they
23 made more than half a million dollars. We did not produce any
24 discovery or tax returns. There was no motion to compel such.
25 There is no evidence. They never asked Mr. Krug regarding

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1 that, and as a result, without such proof, the threshold can't
2 be met. The FLSA claim also must be stricken, and that also
3 goes to wage notice as well.

4 MS. PANAGOPOULOU: May I be heard on that?

5 THE COURT: Let me inquire: Was this preserved in the
6 joint pretrial order as an issue?

7 MS. PANAGOPOULOU: It was not, your Honor.

8 And may I mention something else, defendant Paul Krug
9 testified that this place had 15 full-time employees, and he
10 also testified that it had three locations, actually three
11 locations in New York City, and a location in San Francisco.

12 MR. O'DONOGHUE: That's incorrect.

13 MS. PANAGOPOULOU: And it was not in the JPTO.

14 MR. O'DONOGHUE: Your Honor, this is a threshold legal
15 issue that the plaintiffs have the obligation of meeting. All
16 they had to do was ask Mr. Krug: Did your company -- Glaze
17 Teriyaki, LLC, is one restaurant, it's not a group of
18 restaurants, it's not a holding company, it's a restaurant on
19 Lexington and 54th Street. It's one restaurant. All
20 Mr. Nohhavicka had to do yesterday was say: Mr. Krug, does
21 your company make in excess of half a million dollars? And
22 Mr. Krug would have said yes or no, but he would have given an
23 answer. At any time they could have compelled me, through an
24 order of this Court, to produce a tax return indicating the
25 amount of gross revenues produced. They never did that.

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1 So as a result, as a threshold matter, they cannot
2 meet their burden. I think it would be very confusing to the
3 jury. I understand we're going to the jury today no matter
4 what, I'm sure, since they sat through you would like to have
5 them render a verdict either way, and so would I. But as a
6 threshold matter on the FLSA, to charge them that they have to
7 find whether or not they met the threshold, with no evidence
8 before them, would seem to be an issue.

9 I don't think this has anything to do with the JPTO,
10 this is a threshold evidence matter that the plaintiff must
11 prove, just like they must prove that Mr. Krug is an employer
12 or anything else. These are very standard legal things.
13 Plaintiff's counsel neglected to do so or forgot to do so.
14 That's unfortunate, but that knocks out the FLSA claim as a
15 matter of law.

16 Thank you, Judge.

17 THE COURT: Let me hear from the plaintiffs.

18 MR. NOHAVICKA: Your Honor, since my name was
19 mentioned, if it would be okay, I would like to handle this
20 portion of the argument.

21 THE COURT: Sure.

22 MR. NOHAVICKA: Here we go again with the joint
23 pretrial order and Mr. O'Donoghue's failure to abide by the
24 requirements of the joint pretrial order procedure.

25 If he had raised it as an issue, I certainly would

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1 have asked that question and we would have had proof of that
2 before asking the question. It was unnecessary. The joint
3 pretrial order, as Mr. O'Donoghue fails to accept, is the law
4 of the case. I did not want to protract it, I do not like
5 wasting the Court's time or the jury's time on material that
6 has already been established, and it's enough.

7 He already got away with the prior issues with the
8 joint pretrial order, he doesn't like to follow the rules,
9 that's tough on him now.

10 THE COURT: This is not a helpful way to argue this.

11 MR. O'DONOGHUE: If I may briefly --

12 THE COURT: No. It's not a helpful way to argue it.
13 Do you understand that?

14 MR. NOHAVICKA: Yes, I do.

15 THE COURT: The question is whether or not the
16 plaintiff had a burden, whether or not by reason the joint
17 pretrial order that burden was excused, and if it was not
18 excused, was the burden met or based on the evidence that was
19 adduced, and is the evidence that was adduced sufficient if you
20 do have the burden.

21 MR. NOHAVICKA: My response to that is although it was
22 not even mentioned in the joint pretrial order, that the jury
23 certainly heard enough to adduce that this is a company that
24 does more than \$500,000 a year in business gross. They have
25 businesses in Seattle, in San Francisco, and midtown Manhattan

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1 New York. They testified to at least 15 employees in one
2 location. That certainly is enough for a jury to reasonably
3 conclude that this company does more than \$500,000 a year.
4 It's an interstate company, and that's what the jury has heard
5 and that's what the jury will find.

6 THE COURT: All right.

7 MR. O'DONOGHUE: May I respond briefly?

8 THE COURT: Yes, you may.

9 MR. O'DONOGHUE: In the joint pretrial order, it is
10 not the obligation of the defendants to let the plaintiffs know
11 what their burdens of proof are legally for each of their
12 claims. In fact, these are their claims and they should know
13 this. It was in their complaint, and we did not admit in our
14 complaint that we made more than \$500,000 in our answer. At no
15 time did they ever challenge our answer, which they could have
16 done. At no time did they compel us to produce tax returns,
17 which they could have done.

18 In the joint pretrial order, on page 4, section 6
19 there are stipulations that we agreed to. There was no request
20 and there was no stipulation on the joint pretrial order that
21 counsel is standing firm on where we said we admit that we make
22 more than half a million dollars a year. And as a result, they
23 have failed to meet their burden.

24 And since the jury instructions were provided to us
25 early on in this case, and it's clearly stated on page 19,

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1 maybe it was sharp of me not to bring it up, but it's not my
2 obligation to let them know what they have to prove. So as a
3 result, page 19 it says that they must prove that the
4 company -- again, this company is one restaurant. That's why
5 we do separate LLCs, so that all the other LLCs that may be
6 owned cannot be brought in. There is absolutely no way for a
7 lay juror to make any independent of estimation as to gross
8 sales of a restaurant. They could think restaurants make
9 \$100,000 or \$10 million. We have no idea because they have
10 never been given any proof. This is a threshold FLSA issue.
11 It was never even raised by the plaintiff, as a result, the
12 FLSA claims have to be stricken as a matter of law, and we
13 renew our Rule 50 motion as to that.

14 THE COURT: Anything further from the plaintiff?

15 MS. PANAGOPOULOU: Nothing, your Honor.

16 THE COURT: All right. I will take it under
17 advisement, and I will see you at 10 o'clock.

18 Thank you all very much.

19 (Recess taken)

20 (Continued on next page)

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1 THE COURT: Please be seated. With regard to the
2 issue that was raised before the break regarding the threshold
3 issue, the statute is quite clear. 29 U.S.C. Section 206.
4 Every employer shall pay to each of his employees who in any
5 workweek is engaged in commerce or in the production of goods
6 for commerce, or is employed in an enterprise engaged in
7 commerce or in the production of goods for commerce, wages at
8 the following rates, and it continues.

9 The fact that the two are in the disjunctive has been
10 the subject of note by the United States Court of Appeals for
11 the Second Circuit in *Rogers v. City of Troy* and also in *Jacobs*
12 *v. New York Foundling Hospital*, 577 F.3d, 93. In fact, it was
13 the case, as I think the Supreme Court noted in one of its
14 opinions, the Supreme Court opinion is *Tony & Susan Alamo*
15 *Foundation v. Secretary of Labor*, 471 U.S. 290, 295, note 8.
16 That prior to 1961, the act only covered individuals who were
17 engaged directly in interstate commerce. And enterprise
18 coverage was substantially broadened with the 1961 amendments,
19 so they are in the disjunctive. That's the way the charge is
20 written. That's the way the verdict sheet reads.

21 And there was substantial evidence in this record that
22 the plaintiff at the behest of the defendants traveled to San
23 Francisco to assist in the opening of a facility in San
24 Francisco, easily meeting the interstate commerce requirement
25 or at least permitting the jury to find that it's met.

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1 Furthermore, the circumstantial evidence in this case
2 as to the number of locations, where the locations are, and the
3 number of employees and the number of members, investors in the
4 LLC, all taken together would permit the jury to infer that the
5 dollar threshold was met. But as noted and as is clear from
6 the face of the statute, the dollar threshold does not need to
7 be met if the individual is engaged in commerce or in the
8 production of goods for commerce. That's what I found based on
9 my research of the law.

10 If I've overlooked or missed anything, you are welcome
11 to bring it to my attention.

12 MR. O'DONOGHUE: May I, Judge.

13 THE COURT: You may.

14 MR. O'DONOGHUE: Your Honor, with all due respect, I
15 agree with you as to the disjunctive as the either/or as to
16 interstate commerce. No one is saying this business, which,
17 again, is one restaurant only, is not involved in interstate
18 commerce.

19 What we are saying is, and as your instruction reads
20 on page 19, if I could read it into the record: In addition,
21 for the plaintiff to qualify as an employee of a "enterprise
22 engaged in commerce or the production of goods for commerce,"
23 the enterprise -- here, Glaze Teriyaki -- must have annual
24 gross sales of at least \$500,000. This is an additional
25 requirement on the plaintiff to show that for her to qualify as

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1 an employee. We are not discussing the interstate commerce
2 aspect.

3 This whole case, Judge, as you know, comes down to
4 whether or not in many respects she was an employee. And for
5 her to qualify as an employee of a business engaged in
6 interstate commerce, the plaintiff has the burden of proving
7 that that enterprise not only is engaged in interstate commerce
8 as you've already read the statute, but, furthermore, has gross
9 revenues over that threshold.

10 And I believe, and I've tried to get cases dismissed
11 in the past on this basis where the restaurant does not meet
12 this threshold, and I've been unsuccessful, but the reason that
13 that's in there is that Congress, my understanding, I have done
14 research on this, was trying to cap it so that a really small
15 business wouldn't be dragged into this type of a FLSA action.
16 Here all counsel had to do was ask.

17 THE COURT: Your preferred way for the plaintiff to
18 meet their burden is not the only way they can meet their
19 burden.

20 MR. O'DONOGHUE: You are right. They could have
21 compelled us to produce tax records.

22 THE COURT: So saying all they needed to do doesn't
23 help you at all.

24 MR. O'DONOGHUE: It would have been an admission by
25 the principal of the LLC.

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1 THE COURT: That may be the case, but that doesn't
2 answer whether or not the record permits the jury to infer that
3 it is a business meeting the statutory threshold.

4 MR. O'DONOGHUE: You are right. So then the question
5 is not whether or not in fact the company does in fact gross
6 over that number. It's whether or not there has been evidence.
7 If the Court is denying the motion on the grounds that it feels
8 there is circumstantial evidence allowing the jury to infer it,
9 I would like permission to raise it on summation.

10 THE COURT: So far I have not restricted anybody from
11 raising anything on summation, so that's number one. You have
12 glossed over, in my view, the alternative means to meet the
13 jurisdictional threshold.

14 MR. O'DONOGHUE: I understand what you are saying. It
15 is our position, and obviously it's preserved for the record,
16 that in any of these actions -- I'll be frank with you, your
17 Honor. I have more than this case in front of you and we
18 generally will stipulate, in order to avoid producing financial
19 documents, whether or not a company does meet that threshold.

20 THE COURT: No. We are not communicating at the
21 moment. I understand. But the disjunctive alternative is that
22 this employee was engaged in commerce or the production of
23 goods for commerce. That's the alternative for a business that
24 is under the statutory threshold and states a claim, correct?

25 MR. O'DONOGHUE: I would respectfully disagree.

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1 THE COURT: Now I understand where we are. So it is
2 your view that they are not disjunctive; that they are
3 conjunctive. Is that your position?

4 MR. O'DONOGHUE: I'm saying, your Honor, I agree with
5 you, that there are two ways to show an enterprise is engaged
6 in interstate commerce.

7 THE COURT: No, no, no. That is not what I am saying.
8 That's not what I said. I will read to you, again, the
9 statute. It's not two ways to show that an enterprise is
10 engaged in commerce. That's not what the statute says. It
11 says: Every employer shall pay to each of his employees, who
12 in any workweek is engaged in commerce or in the production of
13 goods for commerce; that is, the employees are engaged in
14 commerce or in the production of goods for commerce. Then
15 there is a semicolon and the word or. Is employed in an
16 enterprise engaged in commerce or in the production of goods
17 for commerce. A business that grosses \$100,000 a year could
18 owe an employee who is engaged in commerce or in the production
19 of goods for commerce a minimum wage, even though that employer
20 is not engaged in commerce or the production of goods for
commerce as defined by the threshold. Is that not the law?

22 MR. O'DONOGHUE: My reading, respectfully, of the law
23 is that in either situation that enterprise must gross a
24 minimum of half a million dollars a year in either regard in
25 order for it to qualify for the FLSA. Your Honor, again, that

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1 is how your jury instruction reads. It reads as an additional
2 qualification.

3 THE COURT: I'm reading on page 18.

4 MR. O'DONOGHUE: I'm looking at page 19, Judge.

5 THE COURT: I'm looking at page 18. The second
6 element of the claim that the plaintiff must prove by a
7 preponderance of the evidence is that she was an employee
8 engaged in commerce or the production of goods for commerce or
9 was employed by an enterprise engaged in commerce or in the
10 production of goods for commerce. Then I go on where I say:
11 To qualify as an employee of an enterprise engaged in commerce
12 or the production of goods for commerce, Glaze Teriyaki must
13 have annual gross sales of at least 500,000. That speaks to
14 the second alternative.

15 MR. O'DONOGHUE: Your Honor, I read that. If you look
16 at the words engaged in production of goods for commerce or
17 enterprise engaged in production of goods for commerce, there
18 is a reason it's a separate paragraph that says in addition
19 because it's my understanding --

20 THE COURT: There are two ways that the plaintiff can
21 meet her burden. One, she can show she was an employee engaged
22 in commerce or in the productions of goods for commerce. The
23 second way is by showing the enterprise was engaged in
24 commerce. And if she is relying on the second way, she must,
25 in addition, show that the enterprise had annual gross sales of

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1 500,000.

2 MR. O'DONOGHUE: Would the Court then be saying that
3 they could not prove that second section; they can only prove
4 engaged in production of goods for commerce because the
5 \$500,000 threshold --

6 THE COURT: You didn't hear me. Were you here this
7 morning? Did you hear what I said two minutes ago?

8 MR. O'DONOGHUE: Yes, your Honor. I believe I did.

9 THE COURT: I said that there is circumstantial
10 evidence in this record from which the jury can infer that the
11 annual gross sales prong of at least \$500,000 is met. That's
12 what I've held. And I think I was pretty clear about that.

13 MR. O'DONOGHUE: You were.

14 THE COURT: What's your question?

15 MR. O'DONOGHUE: I believe, and I'll just state this
16 for the record and I'll let it go because I understand you have
17 made your ruling, I believe that the law itself requires a
18 showing by the plaintiff that it actually, whether by admission
19 or by introduction of evidence, there is an actual showing of a
20 factual basis that the threshold, and in any legal issue there
21 is a threshold, that the threshold itself is met. I don't
22 believe that can be met by inference or circumstantial
23 evidence. I believe it is a requirement that it is proven as a
24 threshold issue.

25 THE COURT: And it cannot be proven by circumstantial

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1 evidence. That's your position.

2 MR. O'DONOGHUE: That's why, your Honor, it says must
3 have. It doesn't say that they can say, well, either it
4 doesn't or it doesn't. It says must. As I understand the law
5 as it is written, it is a factual threshold requirement that
6 they prove that, not that the jury says, well, he probably
7 makes it.

8 THE COURT: No. The jury would have to find it as a
9 fact. They would have to find it as a fact. But this is one
10 of the rare instances where -- I think the one that I'm aware
11 of that can't be proven by circumstantial evidence may be
12 treason. It may be the one thing in the law that can't be
13 proven. Murder can be proven by circumstantial evidence. Most
14 any fact in any case can be proven by circumstantial evidence.
15 You have put to me that this is one of those exceptions where
16 it cannot be proven by circumstantial evidence. I've heard you
17 and I respectfully disagree and have ruled otherwise, that it
18 can be proven by circumstantial evidence. And as to the
19 disjunctive, if you have a case you would like me to look at,
20 please bring it to my attention. I have cited to you the case
21 law and the statutory language, and that's the basis on which
22 I'm relying.

23 Now, I'm not at the moment needing to address the
24 issue of the joint pretrial order. That can be discussed at
25 another time. But before your client can be found liable, the

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1 jury must find number 2. Before you can be liable under the
2 FLSA, they must find the answer to question A2 is a yes.

3 Are our jurors in?

4 THE DEPUTY CLERK: Yes.

5 THE COURT: One second.

6 Bring our jurors in, please.

7 (Jury present)

8 THE COURT: Good morning, ladies and gentlemen. As I
9 indicated to you yesterday, we are now going to have our
10 summations, or closing arguments in this case. And in this
11 situation the parties will have the opportunity to give you
12 their view of what they believe the evidence shows. And I have
13 advised the attorneys as to how I am going to instruct you at
14 the close of the case. And you may hear a lawyer say something
15 like, I expect that the judge will tell you.

16 Now, if any lawyer states a principle that is
17 different than what I instruct you is the law, it is my
18 instructions that you will follow, not their prediction of what
19 they believe I will say. And the same thing with evidence. If
20 any lawyer says something like, well, you heard from the
21 witnesses or you didn't hear from the witnesses and no witness
22 testified to this, that, or the other thing, and your
23 recollection is different on that subject, it is your
24 recollection that controls, not what a lawyer says about the
25 evidence in their closing argument.

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Summation - Mr. O'Donoghue

1 With that said, Mr. O'Donoghue, would you like to
2 proceed.

3 MR. O'DONOGHUE: I would, Judge. Thank you.

4 Good morning, ladies and gentlemen of the jury. Once
5 again, my name is Kevin O'Donoghue, and along with Robert
6 Ontell, it's been my pleasure to defend my clients -- Paul
7 Krug, Dennis Lake and Glaze Teriyaki -- in this case.

8 Just yesterday we talked about promises and I told you
9 what they were promising you would not add up and I'm asking
10 you again today to do that math and find that their claims do
11 not add up. I made you a few promises myself yesterday. I
12 promised you we would be quick. We are here at the next
13 morning, very quick.

14 Why did I tell you this would be quick? Because there
15 is basically no evidence. There is no proof, there is no
16 evidence. What did you see? What did they put into evidence?
17 You are going to look at, and you'll have everything, as the
18 judge told you yesterday. You are going to have everything in
19 front of you.

20 What did you see? You saw a credit card that the
21 company paid for so she can run errands. You saw a business
22 card that she made so she could hand it out to people. And you
23 saw one e-mail, written 15 months into her alleged employment,
24 where she in sum and substance said, I'd like you guys to pay
25 me, if you could, and they have no response. And then she

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Summation - Mr. O'Donoghue

1 worked an additional 15 months after that before she left and
2 went to Europe. That was her testimony. I hope you agree. I
3 saw a lot of you taking notes and I'm sure you can check that
4 when you get back and deliberate.

5 When you deliberate, think about that. What did you
6 see? Where is the proof? She admitted there were no tax
7 documents. She admitted there were no pay stubs. She admitted
8 she didn't keep her time. And then she testified, the
9 plaintiff herself, and Mr. Krug testified, that every other
10 employee in the restaurant, one restaurant, 54th and Lex, one
11 restaurant, everyone else, and she said it too, clocks in,
12 clocks out, paid by ADP, gets a check every week or every other
13 week. Every other person. Because every other person that
14 works for Glaze Teriyaki is an employee.

15 The judge will instruct you on the meaning, the
16 definition of employee. No one has ever said that they don't
17 know who she is. This isn't a case of who is this person.
18 This is a case of someone who initially wanted to learn some
19 things and did learn some things. Didn't graduate from
20 college, like she said she would, and stayed on in an
unreliable role where she did projects here and there.

22 She told you about her social media management of the
23 brand. Ask yourselves. At any time yesterday did you see one
24 Facebook post? Did you see one photograph on Instagram? Did
25 you see one tweet from Twitter? There may be other platforms

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Summation - Mr. O'Donoghue

1 I'm not familiar with, but you get the idea.

2 She says she worked 30 or more hours a week doing
3 this. Did you see any proof of that? Anything? If she did
4 this, why, why would she not give you printouts of the Facebook
5 posts, printouts of the Instagram pictures, printouts of the
6 tweets? Why did they only give you two e-mails; one, the
7 15-month request to be paid and the other, if you read it, it's
8 long, rambling, a list of different things that maybe we could
9 do in different platforms, which Mr. Krug said we are not
10 implementing. You heard this.

11 You heard that there was a professional PR firm that
12 does work with this restaurant. You heard that there is a
13 professional branding and marketing company, Project 13, that
14 does all the branding and marketing. And you heard Ms. Naldo
15 say, well, she did the little things. She helped out. She
16 helped out here and there. That's right. She helped out here
17 and there. But did she do 30 hours a week? Does that add up
18 to you, 30 hours a week? And you didn't see any evidence of
19 that? You didn't see anything. You saw two e-mails and no
20 posts. That's all she did. Everyone else in the restaurant
21 was paid.

22 I want you to think about a couple of things because
23 these cases go by the law and the law has certain requirements.
24 I'm not allowed to talk to you about the law itself. But the
25 law has certain requirements. You will apply the facts that

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Summation - Mr. O'Donoghue

1 you heard to the law that the judge gives you. You have to
2 decide if she was an employee under what the law classifies as
3 an employee. We say she was not. She doesn't meet any of the
4 requirements and, you may recall, I asked her a series of
5 questions, 10 or 15 questions, about things like, did you have
6 to request time off? No. I just let them know if I was going
7 away.

8 How many of you could just call up your employer and
9 say, hey, by the way, I am not going to come in next week; I am
10 going to go to Savannah. None of you. Because you have jobs.
11 You are employees. Or if you had employees, if one of your
12 employees did that, you would probably terminate them. How
13 many of you don't have to be at meetings, don't have to be at
14 work at a certain time, until a certain time. None of you,
15 most likely, because you are employees. Or if you have
16 employees, you require that. All of the indicia of an
17 employee, which you all know, should be met and they have not
18 shown you one shred of it except a credit card and a business
19 card. That's it. That's all you have to show that she was
20 employed at least 30 hours a week. That doesn't add up.

21 You never heard any evidence at all as to whether or
22 not this business was engaged in what's called interstate
23 commerce. There was no evidence of that whatsoever, I submit
24 to you. This is one restaurant in New York City. You never
25 heard any evidence that this restaurant makes the minimum

G4CMNAL2

Summation - Mr. O'Donoghue

1 threshold amount of half a million dollars, \$500,000, so that
2 she would qualify as an employee of an enterprise engaged in
3 that commerce. Did you see a tax record? No. Did you see a
4 tax return? No. Was Mr. Krug asked that question? No. That
5 threshold wasn't met. For all of those reasons I submit to you
6 that you could look at that on a one-issue basis, was she an
7 employee, yes or no, under the law that the Court will give
8 you, and the answer is no and there is no evidence to support
9 it.

10 Now, a few other things. The only real evidence that
11 you heard is testimony from Ms. Naldo herself, herself, what we
12 call self-serving testimony. She came and said, I worked
13 there, I did all these hours, I have no way of proving it, I
14 can't give you my hours, I didn't keep time. I don't have any
15 proof. I don't have the e-mails. I don't have anything to
16 actually show you how I spent those 30 hours a week for 30
17 months. I don't have anything to show you that, but you should
18 take my word for it.

19 Ms. Naldo is a very nice young lady. I don't mean to
20 say anything disparaging about her and I won't. But I'll ask
21 you to assess her credibility and I'll ask you to assess her
22 bias in coming here and filing an action against the company
23 she allegedly worked for 30 months without pay, approximately a
24 year after she stopped working. Why would she do that? Why
25 would she go over four years before she brings a claim? How

G4CMNAL2

Summation - Mr. O'Donoghue

1 many of you would go a week, two weeks, a month, without filing
2 that claim if you had a real claim? If you were a real
3 employee, wouldn't you quit? Wouldn't you stop? Wouldn't you
4 demand payment or leave? If you were an employee, I submit to
5 you, that's what you would do.

6 She came in and she said, oh, yeah, I'm in college.
7 When I asked her, well, it's been nine years, I still haven't
8 graduated. St. John's is a fine school, but it doesn't usually
9 take people nine years to graduate. Nine years. Still hasn't
10 graduated. I was in school full time. Then she said, I got
11 student loans and I withdrew from a lot of classes and I failed
12 otherwise. Because my job was more important, my unpaid
13 internship was more important than my college education.

14 She then said, and I'll remind you, that despite
15 having no income and despite not being a full-time student, she
16 took lots of trips. I'll ask you to consider that as well.
17 How many of you could make no money and then go on trips to
18 Mexico, to Savannah, to Belize, everywhere else she went. I
19 don't recall them all. California, Seattle. She took trips.
20 My mom is in San Francisco. I am going to Mexico with my
21 friends. I'll let you guys know when I'm back.

22 Think about that. Think about her credibility. Think
23 about the person who is bringing this case. Think about the
24 person who is asking you to believe her story and then compare
25 that to Mr. Krug.

G4CMNAL2

Summation - Mr. O'Donoghue

1 Mr. Krug testified, I thought, very credibly about his
2 business, about what he did. He didn't lie to you. He didn't
3 say, I have never heard of this person. He didn't say, I have
4 never met her before. He said, she was a nice girl, she came
5 into my restaurant, I thought she could use some experience.
6 She wanted to build up her résumé and I tried to help her out,
7 and he did. That's exactly what he told you. Nobody is saying
8 anything different.

9 That doesn't make her an employee under the law.
10 Think about it. Think about the fact that since the time that
11 Ms. Naldo left the employ of Glaze, she has never had another
12 job anywhere near this industry. She told you she was a
13 part-time server and now she is not working. She is thinking
14 about some offers that she might have. Think about that.
15 Think about the two people that you heard from and assess their
16 credibility. Look at the bias. What does Mr. Krug have? He
17 has no reason to lie to you. He has no reason to not be
18 credible.

19 What does Ms. Naldo have? Apparently, no money.
20 Apparently, she has an incentive to come in here and try to get
21 you, the jury, to award her money for work she never did.
22 Think about it. Think about what's happening here. Think
23 about the way this has been presented to you, no evidence, no
24 proof; just, I'd like some money. That's not the way this
25 works. That's not the way the world works. We all have to

G4CMNAL2

Summation - Mr. O'Donoghue

1 work. Everyone in here works. We are employed. We are doing
2 something. All of you are taking time out of your employment
3 to be here. I would like you to consider all of those factors
4 when you deliberate.

5 This is a case, as I told you before, that would not
6 add up if we looked at everything. I'm sure you were all
7 waiting for some smoking gun. I'm sure you were waiting for
8 the CSI black light to come out and prove to you, aha, here is
9 the claim, but you didn't see that. You didn't see anything.
10 All you are going to see are those e-mails, couple of
11 photocopies, and you are going to have to look and assess it.
12 And then you are going to have to assess these claims made by
13 the plaintiff.

14 And after you've assessed all those claims, after you
15 have considered the evidence, I am going to ask you to consider
16 whether or not the promises that counsel made to you yesterday
17 morning were fulfilled. I submit to you that none of her
18 promises were fulfilled. I submit to you that all of the
19 defendants' promises to you were fulfilled, and I submit to you
20 there is absolutely no evidence and there should be no recovery
21 by the plaintiff. Please consider that and I thank you again
22 for your time and your service.

23 THE COURT: Thank you, Mr. O'Donoghue.

24 Ms. Panagopoulou, you are going to deliver the closing
25 argument.

G4CMNAL2

Summation - Ms. Panagopoulou

1 MS. PANAGOPOULOU: Yes.

2 THE COURT: Thank you.

3 MS. PANAGOPOULOU: May it please the Court, counsel,
4 people of the jury, yesterday I stood here and I talked to you
5 about a fundamental principle, that if you work, your boss
6 should pay you. You have just heard from defense counsel say
7 to you that Jesseca shouldn't be entitled to be paid. There is
8 no proof that she was ever an employee.

9 Well, let's have a look at the proof that was
10 presented to you yesterday. A company credit card given to her
11 to spend on her business expenses. A company business card
12 given to Jesseca so she can approach new clients on behalf of
13 the company. A company business card that does have Jesseca's
14 e-mail address, Jesseca@GlazeTeriyaki.com. An e-mail from
15 Jesseca to defendants, Paul Krug and Dennis Lake, asking to be
16 paid for her extensive work. Paul Krug's reply: Let's sit
17 down and talk about it. How much money do you want? Jesseca's
18 response that I will read: I guess I'm around an average of
19 30, talking about her hours that she worked, in writing, to the
20 defendants. An e-mail from Jesseca to one of the key,
21 essential business partners of Glaze Teriyaki, Gita McCutcheon,
22 set forwarding in detail all of her business proposals. And
23 Paul Krug's response, good job.

24 And, finally, the testimony of Jesseca Naldo, who told
25 you that for two and a half years she worked for more than 30

G4CMNAL2

Summation - Ms. Panagopoulou

1 hours per week for the defendants, who told you about her
2 expansive duties, from catering to busing to making deliveries,
3 to marketing, to being flown all the way to San Francisco to
4 assist in the opening of a brand-new location. The fact that
5 Paul Krug never disproved any of those statements, he never
6 denied that Jesseca worked for him for two and a half years.
7 He didn't deny that Jesseca was flown to San Francisco or she
8 assisted in the grand opening of the new location. And when he
9 was asked, how many hours per week do you think Jesseca worked,
10 his reply was, I don't know.

11 Now, as far as Dennis Lake is concerned, who is also a
12 named defendant in this lawsuit, he didn't even testify to you
13 yesterday.

14 MR. O'DONOGHUE: Objection, your Honor.

15 THE COURT: Overruled.

16 MS. PANAGOPOULOU: Defense counsel maintains that
17 Jesseca doesn't have a record of all her hours worked. But an
18 employee is under no duty to keep business records, time
19 sheets, or anything like that. That's the employer's duty.
20 Defense counsel maintains that Jesseca doesn't have evidence of
21 her perhaps cleaning tables or working at the cashier. How is
22 she supposed to have evidence of that? Was she supposed to
23 take pictures while she was working? Defense counsel maintains
24 that Jesseca doesn't have W-2 forms or doesn't have pay stubs
25 from the defendants. Well, if she did have W-2 forms and if

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Summation - Ms. Panagopoulou

1 she did have pay stubs, then we wouldn't even need to be here
2 today now, would we.

3 Defense counsel maintains that, and for the purposes
4 of the law, that this was not an employee engaged in interstate
5 commerce. You will hear further from the judge explaining to
6 you what that terminology means. All I'm going to say to you
7 is something they didn't deny either, she flew to San Francisco
8 to represent the company.

9 Defense counsel asks you why didn't she bring this
10 lawsuit sooner? Why didn't she? Why would a 27-year-old woman
11 hesitate to bring a lawsuit like that? Because she told you
12 she was ashamed. She wasn't after it for the money. She loved
13 her job at Glaze Teriyaki. The e-mail that was shown to you
14 yesterday. I'd love to continue to devote as much time as I
15 have to Glaze. Her own words. She loved working there. At
16 one point she loved the defendants. She loved working with
17 them. This wasn't easy for her. And because she hesitated to
18 bring this forward, now she shouldn't recover? They are
19 talking about evidence.

20 Let's talk about the evidence that the defendants have
21 provided. Jesseca took a few trips here and there. Jesseca
22 didn't graduate from college. Jesseca doesn't have a college
23 degree. Jesseca is really struggling with school. Since when
24 in this country does a worker not deserve to be paid because
25 they are a bad student? Since when do F students have no

G4CMNAL2

Charge

1 rights as opposed to A students? After all, if they were so
2 dissatisfied with her performance, they can simply fire her.
3 Paul Krug testified that Jesseca is nonessential, is
4 unreliable. Why would you give a nonessential, unreliable
5 intern a company credit card? Why would you let her represent
6 herself as part of the company to a key business partner? Why
7 would you fly her all the way to San Francisco to assist in the
8 opening of a new location? Why would you entrust her with the
9 marketing duties of a business that is looking to grow and that
10 is so essential to its growth? I will tell you why. Because
11 Jesseca was essential. That's why they didn't fire her. And
12 that's why they strung her along.

13 People of the jury, this was no internship. Jesseca
14 was an unpaid employee. Why would they keep her for two and a
15 half years to work for more than 30 hours per week if she was
16 no good? Now, that doesn't add up.

17 It is now in your hands when you go back to that jury
18 room to make your call. Thank you.

19 THE COURT: Thank you.

20 Ladies and gentlemen, you have now heard the closing
21 arguments of the parties and you reached the point where you
22 are about to undertake your final function as jurors. You paid
23 careful attention to the evidence and I am confident that you
24 will act together with fairness and impartiality to reach a
25 just verdict in the case.

G4CMNAL2

Charge

1 It has been my duty to preside over the trial and to
2 decide what testimony and evidence was relevant under the law
3 for your consideration. My duty at this point is to instruct
4 you as to the law. It is your duty to accept these
5 instructions of law and to apply them to the facts as you find
6 them.

7 On these legal matters you must take the law as I give
8 it to you. If any lawyer has stated a legal principle
9 different from any that I state to you in my instructions, it
10 is my instructions that you must follow. You must not
11 substitute your own notions, your opinions of what the law is
12 or ought to be.

13 You are not to infer from any of my questions or any
14 of my rulings or anything else that's said or done during this
15 trial that I have any view as to the credibility of the
16 witnesses or how you should decide the case.

17 I will give you the typed text of these instructions
18 for your use in the jury room. It is possible that there will
19 be a slight variance between the words I have spoken and the
20 typed text that I will give you. The words I have spoken
21 control over the typed text.

22 As members of the jury, you are the sole and exclusive
23 judges of the facts. You pass upon the evidence. You
24 determine the credibility of the witnesses. You resolve such
25 conflicts as there may be in the testimony. You draw whatever

G4CMNAL2

Charge

1 reasonable inference you decide to draw from the facts as you
2 have determined them. You determine the weight of the
3 evidence.

4 You have take the oath as jurors and it is your sworn
5 duty to determine the facts and to follow the law as I give it
6 to you.

7 It is the duty of the lawyers in this case to object
8 when the other side offers testimony or other evidence that the
9 lawyer believes is not properly admissible. Therefore, you
10 should draw no inference from the fact that there was an
11 objection to any evidence. Nor should you draw any inference
12 from the fact that I sustained or overruled an objection.

13 From time to time, I have had side bar conferences
14 with the lawyers, as well as other conferences out of your
15 hearing. These conferences involved procedural and other
16 matters, and none of the events related to these conferences
17 should enter into your deliberations at all.

18 Your verdict must be solely upon the evidence
19 developed at trial or the lack of evidence. It would be
20 improper for you to consider any personal feelings you may have
21 about the plaintiff or any defendant's race, religion, national
22 origin, sex or age. The parties in this case are entitled to a
23 trial free from prejudice and our judicial system cannot work
24 unless you reach your verdict through a fair and impartial
25 consideration of the evidence.

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Charge

1 Similarly, under your oath as jurors you are not to be
2 swayed by sympathy. Once you let fear, prejudice, bias or
3 sympathy interfere with your thinking, there is a risk that you
4 will not arrive at a just verdict. Your verdict must be based
5 exclusively upon the evidence or the lack of evidence in the
6 case.

7 You should consider and decide the case as a dispute
8 between parties of equal standing in the community and of equal
9 worth. All parties are entitled to the same fair trial at your
10 hands. All parties stand equal before the law and are to be
11 dealt with as equals in this court.

12 In a civil case such as this, the plaintiff has the
13 burden of proving all elements of her claim by a preponderance
14 of the evidence.

15 What does a preponderance of the evidence mean? To
16 establish a fact by the preponderance of the evidence means to
17 prove that the fact is more likely true than not. A
18 preponderance of the evidence means the greater weight of the
19 evidence. It refers to the quality and persuasiveness of the
20 evidence, not the number of witnesses or documents. In
21 determining whether a claim has been proven by a preponderance
22 of the evidence, you may consider the relevant testimony of all
23 witnesses, regardless of who may have called them, and all the
24 relevant exhibits received in evidence, regardless of who may
25 have produced them.

G4CMNAL2

Charge

1 If, after considering all of the testimony, you are
2 satisfied that the plaintiff has carried her burden on each
3 essential point as to which she has the burden of proof, then
4 you must find in her favor. If after such consideration you
5 find that the credible evidence on a given issue is evenly
6 divided between the parties, that is, it is equally probable
7 that one side is right as it is that the other side is right,
8 or that the evidence produced by the plaintiff is outweighed by
9 evidence against her claims, then you must decide that issue
10 against the plaintiff. That is because the party bearing the
11 burden of proof must prove more than simple equality of
12 evidence. The party must prove each element of the claim by a
13 preponderance of the evidence. On the other hand, the party
14 with the burden of proof need prove no more than a
15 preponderance. So long as you find that the imaginary scales
16 of justice tip, however slightly, in favor of the party bearing
17 the burden of proof, that what she claims is more likely true
18 than not, then the element will have been proven by a
19 preponderance of the evidence. But if the scales are equal,
20 that is, they don't tip either way, or they tip in favor of the
21 defendant, then you must find that issue in favor of the
22 defendants.

23 The evidence in this case is the sworn testimony of
24 the witnesses and the exhibits received into evidence.

25 By contrast, the questions of the lawyers are not to

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Charge

1 be considered by you as evidence. It's the witnesses' answers
2 that are evidence, not the questions standing alone.

3 Testimony that has been stricken or excluded by me is
4 not evidence and may not be considered by you.

5 Arguments made by lawyers are not evidence. What they
6 have said to you in their openings and in their summations is
7 intended to help you understand the evidence to reach your
8 verdict. If, however, your recollection of the facts differs
9 from the lawyers' statements, it's your recollection that
10 controls.

11 Any statements I may have made during the trial does
12 not constitute evidence.

13 To constitute evidence, exhibits must be received in
14 evidence. Exhibits marked for identification but not admitted
15 are not evidence, nor are materials brought forth only to
16 refresh a witness' recollection.

17 It is for you alone to decide the weight, if any, to
18 be given to the testimony you have heard and the exhibits you
19 have seen.

20 Generally, there are two types of evidence you may
21 consider in reaching your verdict. One type is direct
22 evidence. Direct evidence is when a witness testifies about
23 something he or she knows by virtue of his or her own senses,
24 something he or she has seen, felt, touched, or heard.

25 Circumstantial evidence is evidence from which you may

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Charge

1 infer the existence of certain facts. Let me give you an
2 example to help you understand what is meant by circumstantial
3 evidence.

4 Suppose today was a bright, sunny day. It wasn't, but
5 I want you to imagine it was, and you came into the courtroom
6 and all the windows were covered; not with these thin shades,
7 but they were totally covered so that you couldn't even see
8 whether it was day or night outside. You could see nothing.
9 And then I want you to imagine that the back doors of the
10 courtroom opened and someone walked in with an umbrella and was
11 shaking it off and a few minutes later someone came in with a
12 raincoat and the raincoat was wet around the shoulders. From
13 those combination of facts you could infer that it had been
14 raining. Now, you wouldn't know. You couldn't tell whether it
15 was raining because you couldn't see out the windows. But you
16 could infer. It would reasonable and logical for you to
17 conclude. That's all there is to circumstantial evidence. You
18 infer on the basis of reason and experience and common sense
19 from one established fact the existence or nonexistence of some
20 other fact.

21 Circumstantial evidence is of no less value than
22 direct evidence. As a general rule, the law makes no
23 distinction between direct evidence and circumstantial
24 evidence. It simply requires that your verdict must be based
25 on all of the evidence presented.

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Charge

1 You have had the opportunity to observe the witnesses
2 in this case. It's now your job to decide how believable each
3 witness was in his or her testimony. You are the sole judges
4 of credibility of each witness and of the importance of their
5 testimony.

6 You should carefully scrutinize all of the testimony
7 of each witness, the circumstances under which the witness
8 testified, the impression the witness made when testifying, and
9 any other matter in evidence that may help you decide the truth
10 and the importance of each witness' testimony.

11 In other words, in assessing credibility you may size
12 up a witness in light of his or her demeanor, the explanations
13 given, and all the other evidence in the case. Always remember
14 that you should use your common sense, your good judgment, and
15 your everyday experiences in life to make your credibility
16 determinations.

17 In deciding whether to believe a witness you may take
18 account of the fact that a witness is a party to the lawsuit.
19 You may also take into consideration any evidence of hostility
20 or affection that the witnesses may have towards one of the
21 parties. Likewise, you should consider evidence of any other
22 interest or motive that the witness may have in cooperating
23 with a particular party. You should also take into account any
24 evidence that a witness or party may benefit in some way from
25 the outcome of the case.

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Charge

1 It is your duty to consider whether the witness has
2 permitted any bias or interest to color his or her testimony.
3 In short, if you find that a witness is bias, you should view
4 his or her testimony with caution, weigh it with care, and
5 subject it to close and searching scrutiny.

6 Of course, the mere fact that a witness is interested
7 in the outcome of the case does not mean that he or she has not
8 told the truth. It is for you to decide from your observations
9 from applying your common sense and experience and all the
10 other considerations mentioned whether the possible interest of
11 any witness or party has intentionally or otherwise colored or
12 distorted his or her testimony. You are not required to
13 disbelieve an interested witness. You may accept as much of
14 his or her testimony as you deem reliable and reject as much as
15 you deem unworthy of acceptance.

16 If you find plaintiff or defendant made a statement
17 that admitted a material fact, you may consider that statement.

18 In deciding whether such a statement was made, you
19 will apply the rules I've already given you about the
20 evaluation of testimony. You may accept either party's version
21 of what happened in whole or in part or you may accept a part
22 of the versions given by both. In deciding how much weight you
23 will give to the statement, if any, you can consider the
24 person's physical condition at the time the statement was made,
25 the words used, the person to whom the statement was made, the

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Charge

1 time that passed between the making of the statement and the
2 occurrence, and all of the other circumstances and conditions
3 existing at the time and place and the other facts in evidence,
4 as well as the reasonableness of the person's explanation of
5 the statement. You may consider the statement to be conclusive
6 and binding on the party or you may ignore it altogether, or
7 you may give it a weight between those two extremes, as you
8 find proper under the circumstances.

9 In making this determination, you may consider whether
10 the witness purposely made a false statement or whether it was
11 an innocent mistake, whether the inconsistency concerns an
12 important fact or whether it had to do with a small detail,
13 whether the witness had an explanation for the inconsistency,
14 and whether that explanation appealed to your common sense.

15 It is exclusively your duty, based upon all the
16 evidence and your own good judgment, to determine whether the
17 prior statement was inconsistent, and if so, how much, if any,
18 weight to give to the inconsistent statement in determining
19 whether to believe all, or part of, the witness' testimony.

20 The law does not require any party to call as
21 witnesses all persons who may have been present at any time or
22 place involved in the case or who may appear to have some
23 knowledge of the matters in issue at the trial. Nor does the
24 law require any party to produce as exhibits all papers and
25 things mentioned in the evidence in the case. I instruct you

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Charge

1 that you are not to speculate as to why neither side called
2 certain witnesses nor produced certain exhibits.

3 I am now going to instruct you on the substantive law
4 that applies to plaintiff's claim.

5 In this lawsuit plaintiff, Jesseca Naldo, has sued of
6 the defendants, Glaze Teriyaki LLC, Paul Krug, and Dennis Lake,
7 alleging that she was the defendants' employee and that the
8 defendants failed to pay her all wages required by federal and
9 state law and failed to abide by applicable state law rules on
10 wage documentation.

11 Ms. Naldo's first and second claims allege that the
12 defendants violated a federal statute called the Fair Labor
13 Standards Act, or sometimes referred to as FLSA, and New York
14 State law, specifically the New York Labor Law, by willfully
15 failing to pay her minimum wages for all the hours she worked
16 as an employee of the defendant. Ms. Naldo's third claim
17 alleges that the defendants failed to provide her with accurate
18 wage statements and failed to procure from her a signed
19 acknowledgement of her wage rate as required by New York Labor
20 Law.

21 The defendants deny Ms. Naldo's claims. They contend
22 that she was not their employee and that they do not owe her
23 any compensation or statutory damages under the FLSA or the New
24 York Labor Law. Instead they argue that the plaintiff worked
25 as an unpaid intern and/or as an independent contractor.

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Charge

1 Because the plaintiff has asserted claims falling
2 under two different laws, it is important that you carefully
3 consider and evaluate each claim separately. The plaintiff has
4 the burden of proving by a preponderance of the evidence all of
5 the facts necessary to establish the essential elements of each
6 claim.

7 Ladies and gentlemen, when you go in the jury room,
8 you are going to have a verdict sheet that will take you
9 through step by step what you need to respond to. So you will
10 have a copy of these instructions and you will also have the
11 verdict sheet with you in the jury room.

12 Plaintiff brings her claim under the FLSA which was
13 enacted by Congress to combat labor conditions detrimental to
14 the maintenance of the minimum standard of living necessary for
15 the health, efficiency, and general well-being of workers.
16 Under FLSA, any employer who fails to pay each of his covered
17 employees minimum wages of a certain rate per hour shall be
18 liable to the employee or employees affected in the amount of
19 their unpaid wages and in an additional equal amount as
20 liquidated damages.

21 I will ask you in the verdict sheet about different
22 time periods that correspond to changes in the rate of pay of
23 the minimum wage, if you get to that point in your
24 deliberations. There may be some threshold questions that you
25 will answer that will not require you to reach these issues.

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Charge

1 But if you do reach it, that's how it will work.

2 A covered employee is one who in any workweek is
3 engaged in commerce or in the production of goods for commerce.
4 That's one way to meet the standard. Or the person is employed
5 in an enterprise engaged in commerce or in the production of
6 goods for commerce. That's the other way to meet the standard.

7 To sustain her burden on this claim, the plaintiff
8 must prove the following three elements:

9 First, that defendants employed the plaintiff some
10 time between February 2012 and August 2014;

11 Second, that the plaintiff was engaged in commerce or
12 in the production of goods for commerce while employed by the
13 defendants;

14 Third, that the defendants failed to pay the plaintiff
15 the minimum wage for all hours worked by her in one or more
16 weeks during the relevant time period.

17 (Continued on next page)

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1 THE COURT: The first element that plaintiff must
2 prove by a preponderance of the evidence is that she was
3 employed by the defendants during the time period from
4 February 2012 to August 2014.

5 There has been evidence in this case and argument in
6 this case as to whether the plaintiff was an employee or an
7 intern, so I instruct you that FLSA applies only to employees
8 and not to interns.

9 Whether or not a person is an employee or an intern is
10 ultimately determined by whether the intern or the employer is
11 the primary beneficiary of the relationship. The primary
12 beneficiary test has three features. First, it focuses on what
13 the intern receives in exchange for her work. Second, it
14 accords the fact finder flexibility to examine the economic
15 reality as it exists between the intern and the employer. And
16 third, it acknowledges that the intern-employer relationship
17 should not be analyzed in the same manner as the standard
18 employee-employer relationship because the intern enters into
19 the relationship with the expectation of receiving educational
20 or vocational benefits.

21 In evaluating the nature of the defendants'
22 relationship with the plaintiff, you should examine the
23 totality of the circumstances, including among other things,
24 the following, and I'm going to mention seven things that you
25 should look at as part of the totality of the circumstances:

G4CTNAL3

Charge

1 The extent to which the intern and the employer
2 clearly understand there is no expectation of compensation, any
3 promise of compensation, expressed or implied, suggests that
4 the intern is an employee, and vice versa.

5 Two, the extent to which the internship provides
6 training that would be similar to that which would be given in
7 an educational environment, including clinical and other
8 hands-on training provided by educational institutions.

9 Three, the extent to which the internship is tied to
10 the intern's formal education program by integrated coursework,
11 or the receipt of academic credit.

12 Four, the extent to which the internship accommodates
13 the intern's academic commitments by corresponding to the
14 academic calendar.

15 Five, the extent to which the internship's duration is
16 limited to the period in which the internship provides the
17 intern with beneficial learning.

18 Six, the extent to which the intern's work
19 complements, rather than displaces, the work of paid employees
20 while providing significant educational benefits to the intern.

21 And seventh, the extent to which the intern and the
22 employer understand that the internship is conducted without
23 entitlement to a paid job at the conclusion of the internship.

24 No one factor is determinative in making this
25 decision. Rather, you should consider all of these factors in

G4CTNAL3

Charge

1 making your decision. If you find that the plaintiff was an
2 intern for the entire period between February 2012 and
3 August 2014, then your consideration of this case ends and you
4 must find for the defendants. On the other hand, if you find
5 that the plaintiff was an intern for some of that time period
6 but an employee for another part of that time period, or an
7 employee for the whole time period, then you should proceed on
8 with your consideration of the claim.

9 Similarly, there has been evidence in this case and
10 argument disputing whether the plaintiff was an employee or an
11 independent contractor. I instruct you, like I just did
12 regarding interns, that the FLSA applies only to employees and
13 not to independent contractors. Even if you have determined
14 that the plaintiff was not an intern, you must still determine
15 whether she was or was not an independent contractor.

16 Whether or not a person is an employee or an
17 independent contractor ultimately is a function of whether the
18 alleged employee so economic depends on the alleged employer's
19 business that, as a matter of economic reality, the plaintiff
20 is not in business for herself. In evaluating this, you should
21 look at the totality of the circumstances, including, among
22 other things -- and now I'm going to name six factors:

23 One, the degree of control exercised by defendants
24 that you find to be the plaintiff's employer over the
25 plaintiff's work.

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1 Two, the duration and permanency of the relationship
2 between the parties.

3 Three, the skill and independent initiative required
4 to perform the plaintiff's work.

5 Four, the extent of the relative investments of the
6 plaintiff and her employer in the business.

7 Five, the degree to which plaintiff's opportunities
8 for profit and loss depends on her employer; and

9 Six, the degree to which the services rendered by the
10 plaintiff are an integral part of her employer's business.

11 No one factor is determinative in making this
12 decision, rather you should consider all of these factors and
13 any other factor that you deem relevant to the inquiry in
14 making your determination.

15 If you find that the plaintiff was an independent
16 contractor for the entire period of time in question,
17 February 2012 to August 2014, then your consideration of the
18 case ends and you must find for the defendants. But just as I
19 instructed you before regarding interns, if you find that the
20 plaintiff was an independent contractor for some part of that
21 time period and an employee for other parts of that time period
22 or an employee for the entire time period, then you should
23 proceed on with your consideration of this claim. To the
24 extent that you find that the plaintiff was an independent
25 contractor or an intern for part of the period from

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1 February 2012 through August 2014, she could not have been an
2 employee at the same time, and she would not be entitled to
3 minimum wage pay for any time she was not an employee.

4 The second element of the claim that the plaintiff
5 must prove by a preponderance of the evidence is that she was
6 an employee engaged in commerce or the production of goods for
7 commerce, or that she was employed by an enterprise engaged in
8 commerce or the production of goods for commerce. So she must
9 satisfy one of those two for the second element.

10 The term "in commerce" has a broad meaning, and
11 includes any business, trade, transportation, transmission, or
12 communication between any place within one state and any place
13 outside that state.

14 Now the term "an enterprise engaged in commerce" has a
15 similarly broad meaning, and includes any enterprise engaged in
16 trade, transportation, transmission, or communication between
17 any place within one state and any place outside of that state.

18 To be "engaged in production of goods for commerce"
19 means to be involved in producing, manufacturing, mining,
20 handling, or transporting goods, or in any manner working on
21 such goods or working in any closely related process or
22 occupation directly essential to the production of goods for
23 commerce. Similarly, the term "enterprise engaged in
24 production of goods for commerce" means an enterprise involved
25 in producing, manufacturing, mining, handling, or transporting

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1 goods for commerce.

2 In addition, for the plaintiff to qualify as an
3 employee of an "enterprise engaged in commerce or the
4 production of goods for commerce," the enterprise -- here,
5 Glaze Teriyaki -- must have annual gross sales of at least
6 \$500,000.

7 The third element of the claim is that the defendants
8 failed to pay the plaintiff the minimum wage required under
9 FLSA. To prove this element, the plaintiff must establish by a
10 preponderance of the evidence that during part or all of the
11 time period she was employed by the defendants, the defendants
12 paid her less than what was legally due in minimum wages. The
13 statutory federal minimum wage required to be paid during
14 periods of time relevant to the case was \$7.25 an hour.

15 The federal minimum wages that plaintiff should have
16 been paid are calculated by multiplying the number of hours she
17 worked as an employee in each workweek up to 40 hours by the
18 minimum wage applicable to that workweek, here \$7.25 an hour.
19 That is a calculation that the Court will do if you answer
20 certain questions on the verdict sheet. You may never get to
21 the question, but if you do get to the question, the
22 calculation, the arithmetic will be done by the Court on that.

23 If the plaintiff has proven by a preponderance of the
24 evidence that the defendants paid her less than the calculated
25 amount, she has satisfied this element. But you do need to

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Charge

1 know and you do need to respond to the question of whether the
2 defendants failed to pay plaintiff the federal minimum wage for
3 any hours she worked.

4 The plaintiff bears the burden of proving she
5 performed work for which she was not properly compensated.
6 However, the law requires employers to keep accurate records of
7 the hours each employee works each day and the total hours
8 worked each week. If you determine that the defendants have
9 failed to reasonably maintain such records, then the plaintiff
10 is permitted to prove the number of hours she worked through
11 other sorts of evidence, and you may determine the number of
12 hours the plaintiff worked based on her recollection and your
13 reasonable inferences drawn therefrom. In this respect, the
14 plaintiff's recollection must be more than mere speculation,
15 but need not be precise, and may consist solely of an
16 approximation of the hours that she worked.

17 An employee is considered to be working for purposes
18 of this claim whenever she exerts herself, physically or
19 mentally, for a task controlled or required by the employer and
20 performs the task primarily for the benefit of the employer,
21 even if those hours go beyond the employee's scheduled shift.
22 In this regard, waiting for assignment or being on call,
23 waiting for something to happen is also work, as I just defined
24 it, as long as the waiting is a task controlled or required by
25 the employer and the employee is performing that task primarily

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Charge

1 for the benefit of the employer.

2 If you find that the plaintiff has proven that the
3 defendants are liable to her for unpaid wages, then you will
4 determine or make findings that will enable the Court to
5 calculate the amount of damages.

6 The damages will be the difference between the amount
7 that you find the plaintiff should have been paid under the
8 federal minimum wage and the amount that you find that the
9 defendants actually paid the plaintiff. So if you get to this
10 point, the questions you're going to be asked will be for the
11 period February 2, 2012 through December 30, 2013, how many
12 weeks, if any, was plaintiff entitled to be paid as an
13 employee.

14 And that same question will be asked for the time
15 period December 31, 2013 through August 2014, how many weeks,
16 if any, was plaintiff entitled to be paid as an employee.

17 Third, you will be asked for each week that you found
18 that plaintiff was employed by defendants, did plaintiff work
19 at least 30 hours each week, yes or no.

20 For the period February 2, 2012 through December 30,
21 2013, how much was plaintiff in fact paid, if anything.

22 And that same question for the period December 31
23 through August 2014.

24 That's how it is structured.

25 If you find that the plaintiff has proven that the

G4CTNAL3

Charge

1 defendants are liable for unpaid wages under the statute, under
2 FLSA, the special verdict sheet will ask you to decide whether
3 the defendants acted willfully. An employer acts willfully if
4 it knew or showed reckless disregard for the question of
5 whether its conduct was prohibited by FLSA. An employer acts
6 with reckless disregard when it acts or fails to act with a
7 conscious lack of concern for the consequences.

8 If you find that the defendants are liable to the
9 plaintiff for any unpaid minimum wage, the plaintiff is also
10 entitled to liquidated damages equal to the total unpaid wages
11 due under the FLSA, unless the defendants demonstrate that they
12 acted in good faith and had reasonable grounds for believing
13 that they had not violated FLSA. To establish the requisite
14 good faith, an employer must show that it took active steps to
15 ascertain the dictates of FLSA and then to act to comply with
16 them.

17 Individuals, here Mr. Krug and Mr. Lake, can qualify
18 under FLSA under employers and thus be personally liable for
19 violations of FLSA's minimum wage provisions. The liability of
20 an individual defendant under FLSA depends on whether that
21 individual possessed the power to control the employee in
22 question. This power may exist where an individual defendant's
23 role within the company and the decision that such a role
24 entails directly affect the nature or conditions of the
25 employee's employment. The focus here is on the economic

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Charge

1 reality of the situation, rather than more technical concepts,
2 and is based on the totality of circumstances. An individual
3 can be an employer for FLSA purposes even when his or her
4 control over the employee in question is restricted, indirect,
5 or exercised only occasionally.

6 You may also consider several factors in determining
7 whether an individual defendant is an employer under FLSA. No
8 single factor is controlling. Relevant factors include the
9 following four factors:

10 Did the individual have the power to hire and fire the
11 employee?

12 Did the individual have the power to supervise and
13 control the employee's work schedules or the power to supervise
14 or control the employee's conditions of employment?

15 Did the individual have the power to determine the
16 employee's rate and method of payment?

17 Did the individual have the power to maintain
18 employment records?

19 You may also take into account whether the individual
20 you are considering had operational control of the corporation
21 that employed the plaintiff, and also you can consider whether
22 they possessed an ownership interest in the employing entity,
23 or whether they controlled significant functions of the
24 business, such as determining employees' salaries and/or making
25 hiring decisions.

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Charge

1 These factors are not exhaustive. You may determine
2 that an individual defendant is or is not an employer without
3 finding that they meet or do not meet any or all of these
4 factors. You may also consider any other factors that you
5 think are relevant to determining whether the individual
6 defendant you are considering had the power to control the
7 means and manner of plaintiff's employment, and thus the
8 individual defendant qualifies as the plaintiff's employer.

9 Now that concludes my instructions on the Fair Labor
10 Standards Act claim. There are two claims asserted under New
11 York Labor Law, and I must give you instructions on them as
12 well.

13 The plaintiff asserts a claim against the defendants
14 for failure to pay her the minimum wage required by New York
15 State law. New York law requires that every employer pay to
16 each of its employees for each hour worked the applicable
17 minimum wage. The elements of this state law claim are similar
18 but not identical to the FLSA claim which I described to you.

19 To sustain the burden of proof with respect to the
20 minimum wage claim under New York Labor Law, the plaintiff must
21 prove the following two elements:

22 That the defendants employed the plaintiff; and
23 Second, that the defendants failed to pay the
24 applicable minimum wage.

25 Just like under the federal law, the first element

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1 that the plaintiff must prove is that she was employed by the
2 defendants during the period February 2012 through August 2014.
3 The test for determining whether the plaintiff was an employee
4 or an intern under New York Labor Law is the same test as it is
5 under federal law. The test for determining whether plaintiff
6 was an employee or an independent contractor under New York
7 Labor Law, however, is somewhat different than the test under
8 federal law, and I will explain the state law test.

9 The critical inquiry under New York law in determining
10 whether an individual is an employee or an independent
11 contractor pertains to the degree of control exercised by the
12 person who is said to be the employer over the results produced
13 or the means used to achieve the results.

14 So there are five factors under the state law test:

15 Did the person work at her own convenience?

16 Was she free to engage in other employment?

17 Was she on the payroll of one of the corporate
18 defendants?

19 And was she on a fixed schedule?

20 Just like under the FLSA, these factors are not an
21 exhaustive list. You may consider additional factors on the
22 issue of the alleged employer's degree of control over the
23 employee's work. If you find that plaintiff was an employee
24 instead of an intern or independent contractor for any period
25 between February 2012 and August 2014, you should move on to

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Charge

1 consider the next element of plaintiff's state law claim.

2 If you conclude that plaintiff has proven the first
3 element, then you must determine whether the defendants failed
4 to pay her the applicable minimum wage under New York Labor
5 Law. To prove this element, the plaintiff must establish by a
6 preponderance of the evidence that during part or all of the
7 time she was employed by the defendants, the defendants paid
8 her less than was legally due in minimum wages. The statutory
9 minimum wages required to be paid under New York law are
10 different than those under federal law. For any workweek
11 February 2012 and December 2013, the statutory minimum wage
12 under New York law was \$7.15 an hour. For any workweek between
13 December 31, 2013 and August 2014, the statutory minimum wage
14 under New York law was \$8 an hour.

15 The state minimum wages that the plaintiff should have
16 been paid are calculated by multiplying the hours worked as an
17 employee up to 40 hours by the minimum wage applicable to that
18 workweek. If the plaintiff proves by a preponderance of
19 evidence that the defendants paid her less than the calculated
20 amount, she has satisfied this element.

21 The plaintiff bears the burden of proving she
22 performed work for which she was not properly compensated. To
23 aid plaintiffs in meeting that burden, New York law, like
24 federal law, requires employers to keep accurate records of
25 each hour worked and the total hours worked each week. If you

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1 determine that the defendants have failed to reasonably
2 maintain such records, New York law, again like federal law,
3 requires that the employer in violation shall bear the burden
4 of proving that the complaining employee was paid wages,
5 benefits, and supplements.

6 So actually in that regard, New York law is somewhat
7 different than FLSA. I told you before that under FLSA, the
8 plaintiff may testify as to her recollection, it cannot be
9 speculation but it can be based on recollection. And under New
10 York law, the employer bears the burden of proving that the
11 complaining employee was paid wages, benefits, and wage
12 supplements.

13 If you find that the plaintiff has proven that the
14 defendants are liable to her for unpaid minimum wages, then the
15 Court will again determine what amount of money she is owed.
16 The measure of damages is the difference between the amount you
17 find that she should have been paid under New York law and the
18 amount you find that defendants actually paid plaintiff.

19 New York Labor Law also authorizes the award of
20 liquidated damages in the amount of 100 percent of unpaid wages
21 unless the employer proves a good faith basis to believe that
22 its underpayment of wages was in compliance with law.

23 The third and final claim that the plaintiff brings is
24 that the defendants failed to provide her with accurate wage
25 statements and failed to procure from her a signed

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1 acknowledgment of her wage rate as required by New York Labor
2 Law. Again, just like her state minimum wage claim, the
3 plaintiff is only entitled to recover for missing wage
4 documentation if she proves by a preponderance of the evidence
5 that she was defendants' employee. Thus, you should only
6 consider the plaintiff's wage documentation claim to the extent
7 of and during the time periods that you have found that she was
8 defendants' employee under state law.

9 Under New York law, an employer is required to furnish
10 each employee with a statement upon every payment of wages. It
11 should include the following information: the dates of work
12 covered by that payment of wages; the name of the employee;
13 name of the employer; address and phone number of the employer;
14 rate or rates of pay and basis thereof, whether paid by hour,
15 shift, day, week, salary, piece, commission or other; the gross
16 wages; deductions, allowances, if any claimed; and net wages.
17 If the plaintiff proved be a preponderance of the evidence that
18 defendants did not provide her with accurate wage statements,
19 defendants are liable for statutory damages.

20 Similarly, an employer must provide a notice to every
21 employee within ten days of the start of employment containing
22 the following information: the rate of pay and the basis
23 thereof; allowances, if any, including tip, meal, or lodging
24 allowances; the regular payday designated by the employer; the
25 name of the employer; any "doing business as" names used by the

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1 employer; the physical address of the employer; employer's main
2 office or principal place of business, and a mailing address,
3 if different; and the telephone number of the employer. Each
4 time the employer provides such a notice to an employee, the
5 employer shall obtain from the employee a signed and dated
6 written acknowledgment in English and in the primary language
7 of the employee of the receipt of this notice, which the
8 employer shall preserve and maintain for six years. If the
9 plaintiff proved by a preponderance of the evidence that the
10 defendants failed to provide her with such an acknowledgment,
11 defendants are liable for statutory damages.

12 Similar to federal law, the individual defendants,
13 Mr. Krug and Mr. Lake, can be personally liable for any of the
14 damages you award the plaintiff under New York law if they
15 qualify as employers. In determining whether the individual
16 defendants are liable as employers under New York law, you
17 should apply the same economic realities test that I have
18 previously explained to you in my instructions on federal law.
19 If Mr. Krug and Mr. Lake are employers under federal law, they
20 are also employers under New York law.

21 Now I have prepared a special verdict form, as I
22 mentioned, for use in recording your decisions. Remember, each
23 verdict must reflect the conscientious judgment of each juror.
24 You should answer every question except where the special
25 verdict form indicates otherwise. You should also proceed

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1 through the questions in the order in which they're listed.

2 And you will get this to go with you in the jury room.
3 I'm going to give you eight copies of the verdict sheet and I
4 will give you one copy of the jury instructions, but you're
5 only going to return one signed copy of the verdict sheet. It
6 will be signed and dated by your foreperson. And it's very
7 important for you to remember that the questions on the verdict
8 sheet must be answered in light of the instructions that I have
9 given you on the law. So when the questions are asked, you
10 have to remember that the terms that are used are all the terms
11 that were defined in my instructions to you on the law.

12 Now if during the deliberations you want any testimony
13 read, please send out a note indicating the testimony you want
14 to have read back. Please be as specific as possible. I'm
15 going to arrange for the exhibits to go into the jury room so
16 you will have those. And if you want a further explanation of
17 the law as I have explained it to you, you may also request
18 that.

19 Your requests for exhibits or testimony, in fact any
20 communication with the Court, should be made in writing, signed
21 by your foreperson, and given to deputy marshal outside the
22 courtroom. In any event, do not tell me or anyone else how the
23 jury stands on any issue until after you have reached a
24 unanimous verdict.

25 Many of you have taken notes during the trial. I want

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Charge

1 to emphasize to you that notes are simply an aid to memory.
2 Notes that any of you have made may not be given any greater
3 weight or influence in the determination of the case than the
4 recollections or impressions of other jurors, whether from
5 notes or memory, with respect to the evidence presented or what
6 conclusions, if any, should be drawn from such evidence. Any
7 difference between a juror's recollection and another juror's
8 notes should be settled by asking to have the court reporter
9 read back the transcript, because it's the court record rather
10 than any juror's notes upon which the verdict must be based.

11 It is your duty as jurors to consult with one another
12 and to deliberate with a view to reaching an agreement, and
13 that agreement must be a unanimous agreement. Each of you must
14 decide the case for himself or herself, but you should do so
15 only after consideration of the case with your fellow jurors,
16 and you should not hesitate to change an opinion when convinced
17 that it is wrong. Your verdict must be unanimous, but you're
18 not bound to surrender your honest convictions concerning the
19 weight or effect of the evidence for the mere purpose of
20 returning a verdict solely because of the opinion of other
21 jurors. Discuss and weigh your respective opinions
22 dispassionately, without regard to sympathy, without regard to
23 prejudice or favor for either party, and adopt that conclusion
24 which in your good conscience appears to be in accordance with
25 the evidence and the Court's instructions on the law.

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1 Please remember, you're not partisans, you are judges,
2 judges of the facts, not representatives of a cause or
3 constituency.

4 Again, each of you must make your own decision about
5 the proper outcome of the case based on your consideration of
6 the evidence and your discussions with your fellow jurors. No
7 juror should surrender his or her conscientious beliefs solely
8 for the purpose of returning a unanimous verdict. If at any
9 point you find yourselves divided, do not inform the Court of
10 what the vote is on the split. Once you have reached a
11 verdict, do not announce what that verdict is until I ask you
12 to do so in the courtroom. You will notify the deputy marshal
13 outside the courtroom when you have reached a verdict.

14 Once you get into the jury room, you must select a
15 foreperson who will be responsible for signing all
16 communications to the Court on behalf of the jury and for
17 handing them to the deputy marshal during your deliberations.
18 This should not be understood to mean that an individual cannot
19 send the Court a note should the foreperson refuse to do so.

20 After you have reached a verdict, your foreperson will
21 fill in one original of the special verdict forms, sign it and
22 date it, and advise the deputy marshal that you're ready to
23 return to the courtroom. Each of you must be in agreement with
24 the verdict that is announced in court. Once your verdict is
25 announced by your foreperson in open court and officially

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2 Charge

3 recorded, it cannot ordinarily be revoked.

4 Finally, let me state that your oath sums up your
5 duty, and that is without fear or favor to anyone, you will
6 well and truly try the issues based solely upon the evidence
7 and the Court's instructions as to the law.8 Ladies and gentlemen, that concludes my instructions.
9 You are now welcome to stand up and stretch for a moment while
I see the lawyers at sidebar to see whether I missed or
overlooked anything.

10 (Continued on next page)

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1 (At sidebar)

2 THE COURT: Anything from the plaintiff?

3 MS. PANAGOPOULOU: No.

4 THE COURT: Anything from the defendant?

5 MR. O'DONOGHUE: The New York Labor Law, you named
6 four out of the five, you didn't say fringe benefits, which was
7 number three. I don't know that it's material though, Judge.

8 THE COURT: We have clean copies of the instructions
9 that will be marked as our next court exhibit, Court Exhibit 7.

10 MR. O'DONOGHUE: I don't think it's a huge issue, I
11 just wanted to raise it.

12 THE COURT: This is --

13 MR. O'DONOGHUE: If you look at page 26, you didn't
14 read number three.

15 THE COURT: Would you like me to do that, or would you
16 prefer that I not?

17 MR. O'DONOGHUE: I prefer that you did, because I
18 think it's relevant.

19 THE COURT: All right.

20 MR. O'DONOGHUE: If it's not too much trouble.

21 THE COURT: It's not too much trouble at all.

22 MS. PANAGOPOULOU: Could I say that would be
23 prejudice.

24 THE COURT: What?

25 MS. PANAGOPOULOU: I think that would be prejudice to

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1 our side because you're reemphasizing.

2 THE COURT: So should I grant a mistrial?

3 MR. NOHAVICKA: No.

4 THE COURT: What do you want me to do? What do you
5 urge I do?

6 MR. NOHAVICKA: Withdrawn.

7 MS. PANAGOPOULOU: Withdrawn.

8 THE COURT: Okay.

9 (Continued on next page)

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1 (In open court)

2 THE COURT: All right. Ladies and gentlemen, I
3 instructed you on the test for determining whether plaintiff
4 was an employee or an independent contractor under New York
5 Labor Law, and I told you there were five factors. And you
6 remember I told you they were not an exhaustive list but
7 they're just factors that you should consider in assessing the
8 degree of control over the plaintiff, and I apparently only
9 read you four of the five, so I will try it again, whether the
10 plaintiff worked at her own convenience, whether the plaintiff
11 was free to engage in other employment, whether the plaintiff
12 received fringe benefits, whether the plaintiff was on the
13 payroll of one of the corporate defendants, or whether the
14 plaintiff was on a fixed schedule.

15 So those are the factors that you may consider.

16 Anything else from the defense?

17 MR. O'DONOGHUE: No, your Honor, thank you.

18 THE COURT: And you have the special verdict sheet,
19 and you both are in agreement on the special verdict sheet, is
20 that correct?

21 MS. PANAGOPOULOU: Yes.

22 MR. O'DONOGHUE: Defendant agrees, Judge.

23 THE COURT: All right. I will ask the deputy to hand
24 eight copies of the special verdict sheet and one copy of the
25 instructions to the jurors.

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Charge

1 And now, ladies and gentlemen you may discuss the case
2 among yourselves.

3 Before that, I'm going to ask the deputy marshal, the
4 court security officer, to step forward to be sworn.

5 (Court security officer sworn)

6 THE COURT: Now you may retire. Thank you.

7 (Jury retired to deliberate, time noted: 11:52 a.m.)

8 (Jury not present)

9 THE COURT: First order of business is for plaintiff's
10 counsel and defendants' counsel to get together on the exhibits
11 that have been received into evidence, and if they're in
12 agreement, you will give them to my deputy who will hand them
13 to the marshal to go in the jury room. If you're not in
14 agreement, then he will come down and referee any disagreement.
15 That's number one.

16 Number two, I ask that you remain as I call it the
17 eight-minute rule, so it means you can't leave the building but
18 if you want to walk down to the cafeteria, as long as Flo knows
19 how to reach you, and you can work that out with her, or if you
20 want, you can leave someone behind in the courtroom during the
21 deliberations.

22 Lastly, I want to say that I think the lawyers on both
23 sides of this case did something remarkable in very efficiently
24 presenting this case to the jury, which certainly reduces the
25 expense of a jury trial and I think enhances juror

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1 comprehension. Cases can get drawn out, and in the middle of a
2 trial it's very easy for a juror, if not a judge, to say where
3 are we, we lost our way, who could possibly know where we're
4 headed in this case at this stage. So everybody stayed
5 focused, the arguments, the openings and the closings were
6 efficient and put your respective clients' positions with their
7 best feet forward. So I commend all the lawyers who
8 participated in this trial in doing this in an efficient and
9 effective manner.

10 We are adjourned. Thank you.

11 (Recess taken)

12 (Continued on next page)

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1 THE COURT: We have a note. It's been marked as Court
2 Exhibit 8 and it reads: Section A. Do question 2 and 3 depend
3 on answer to No. 1?

4 I propose to answer the question in a written note
5 back to the jury which will read as follows: If the answer to
6 question A1 is yes, then you should proceed to answer questions
7 A2 and A3. If the answer to question A1 is no, then you should
8 proceed to section B. Any objection from the plaintiff?

9 MS. PANAGOPOULOU: No, your Honor.

10 THE COURT: Any objection from the defendant?

11 MR. O'DONOGHUE: No, your Honor.

12 THE COURT: This is going to be marked as Court
13 Exhibit 9 and I will ask the deputy to hand this to the deputy
14 marshal.

15 Thank you all very much.

16 (Recess pending verdict)

17 THE COURT: I have an envelope that was received at
18 1:25. It says verdict and it is signed and dated by the
19 foreperson. I will mark it as Court Exhibit 10 and have the
20 jurors brought in, please.

21 (Jury present)

22 THE COURT: Will the foreperson please identify
23 themselves. If you will please stand. Has the jury reached a
24 verdict?

25 THE FOREPERSON: Yes, we have.

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1 THE COURT: Is it unanimous?

2 THE FOREPERSON: Yes, it is.

3 THE COURT: It is reflected on the verdict sheet which
4 you have signed and dated?

5 THE FOREPERSON: Yes, it is.

6 THE COURT: Madam Deputy, if you'll return the verdict
7 to the foreperson and take the verdict.

8 THE DEPUTY CLERK: Was plaintiff an employee of the
9 defendants within the meaning of federal law, yes or no?

10 THE FOREPERSON: No.

11 THE DEPUTY CLERK: Was an plaintiff an employee of the
12 defendant, within the meaning of New York law?

13 THE FOREPERSON: No.

14 THE COURT: If you please retrieve the original
15 verdict sheet, Madam Deputy, and poll the jury.

16 (Jury polled; jury answered in the affirmative)

17 THE COURT: The verdict will be recorded. Any
18 objection from the plaintiff to my discharging the jury?

19 MS. PANAGOPOULOU: No, your Honor.

20 THE COURT: Any objection from the defendant?

21 MR. O'DONOGHUE: No. Thank you, your Honor.

22 THE COURT: Ladies and gentlemen, I want to tell you
23 the story of a judge who sat on this court for many years. He
24 sat for well into his eighties and his name was Edward
25 Weinfeld. And he had a very unusual custom at the end of a

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1 jury trial. He would say to the jurors, I will not thank you
2 for your service. And it struck everybody as odd and peculiar
3 and he went on to explain. Because you didn't come here to do
4 a favor for me or a favor for the parties. You came here
5 because this is one of the obligations, privileges, and duties
6 of American citizenship. It is one of the most direct ways
7 that you can participate in the affairs of government.

8 We could have a system like other countries have where
9 someone with a black robe, a professional jurist, decides a
10 dispute of this sort. And however that case was decided, there
11 would be someone with some lingering doubt and question in
12 their mind. Who appointed that judge? What political party
13 does he belong to? What are his beliefs and values? And it
14 would always be open to some form of questioning, even if the
15 judge did his or her honest best on the problem.

16 But we have a system where the eight of you who come
17 from different geographic areas within this very large
18 district, who come from different walks of life, different
19 occupations, people who might never have met one another but
20 for your jury service here. Before yesterday morning you were
21 total strangers and yet the eight of you come together, listen
22 to the evidence in a dispute that relates to total strangers
23 and reach a unanimous verdict. It's not an exaggeration to
24 say, I am in awe of that. You can be in awe of it as well.

25 And everything I'm saying to you I would say to you if

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1 your verdict was something else, if you had found a different
2 way on your verdict sheet. I express no opinion on that. But
3 the whole concept of eight people coming together, having a
4 dispute which the parties were unable to resolve among
5 themselves, this is a great system that we have been handed by
6 others and it is up not just to me, but also to you to keep
7 this system alive by coming and serving.

8 I know it's very disruptive. I had other things that
9 you were planning to do. You're kept in a courtroom. You're
10 kept waiting at times, etc. This is a remarkably brief trial
11 and that is a good thing. But we are heading into the warm
12 weather and you are going to be going to barbecues, maybe
13 Memorial Day, maybe the 4th of July, running into family
14 members and friends and neighbors.

15 And I certainly don't want you to be unkind or mean to
16 anyone, but when you are at one of these barbecues, I wouldn't
17 be at all surprised if you run into somebody who tells you how
18 they beat their way out of jury duty or how they are planning
19 on beating their way out of jury duty. And I want you to think
20 of your own service in this case and think about the jurors who
21 serve in this courthouse on trials that go on for weeks and
22 sometimes for months. And I ask that you think of me when you
23 hear this and let that otherwise good person know that you
24 don't find that one bit funny. You don't find that one bit
25 funny or any different than somebody telling you that they

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cheated on their taxes or planned to cheat on their taxes.

This is a privilege of citizenship and you, ladies and gentlemen, having done your duty, and you can go forward for the rest of your lives knowing that you performed this very important duty. I congratulate you for that.

Now, as I said, after the case is over you are free to discuss it with anyone you want. You are also free not to discuss it. And some folks find that where they draw the line is if they are talking to family or friends, they will talk about what they saw in the courtroom, what the lawyers did, what the judge did, what the setup was, what the testimony was. But many people choose to draw the curtain closed on what was said between and among the jurors during the deliberation process and keep that private to themselves. You have to make your own decision on that, but I just alert you to that.

With that, ladies and gentlemen, with my deep admiration for your service, you are now discharged and free to go. Thank you, ladies and gentlemen.

(Jury discharged)

THE COURT: Anything further from the plaintiff?

MS. PANAGOPOULOU: No, your Honor.

THE COURT: Anything further from the defendant?

MR. O'DONOGHUE: No. Thank you, Judge.

THE COURT: Thank you. We are adjourned.

(Trial concluded)